No. 95-263

(2)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

CHESHIRE MEDICAL CENTER,
PETITIONER,

v.

W.R. GRACE & CO. AND
W.R. GRACE & CO. – CONN.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

W.R. Grace & Company is the parent corporation of W.R. Grace & Co. – Conn. Grace's subsidiaries or partnerships, other than wholly-owned operations, are: A-O Grace Kaustik, Boodin Partnership, Carbon Dioxide Slurry Systems LP, Grace Cocoa Associates LP, Grace Offshore Turnkey, Grace Ventures Partnership I & II, Healthcare Medical, Immunecare of Hollywood, Immunecare of Key West, Infusion Systems, New Bedford Infusioncare, Nippon Dearborn Kabushiki Kisha, North Suburban Dialysis, OB One & IV too, Palm Springs I.V. Care II, Paramount Coal Company, Pharmacy Direct, Primecare Home Health Services, Grace Specialty Chemical Indonesia P.T., Pursue Gas Processing and Petrochemical Company, Quality Home Care Services of Watertown, NY, Sleep Diagnostic Associates, Sisters of Charity Home Health Care, and VNA-NMC Homecare Partnership.

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Prior Proceedings and Factual Background

Following a four and one-half week trial, during which the petitioner was permitted to call twenty-one witnesses — either live or by deposition testimony — and to introduce numerous documents which it contended supported its claim, a jury concluded that the respondents' asbestos-containing fireproofing product, Monokote-3, was not unreasonably dangerous, posed no hazard to anyone and did not have to be removed from the petitioner's building. The jury was immediately polled, and each juror confirmed without hesitation that the verdict for the respondents was unanimous. The petitioner subsequently filed a motion for a new trial which was denied by the district court on the grounds that "the petitioner's substantial rights were not adversely affected" by certain alleged evidentiary and jury instruction errors made at trial, and that there was therefore

no basis for overturning the verdict.[1] Applying similar reasoning, the First Circuit Court of Appeals affirmed the judgment on the jury's verdict and the district court's denial of the motion for new trial. The court of appeals subsequently denied the petitioner's petition for rehearing and suggestions for rehearing in banc, thus concluding that there existed no basis for the claims of error that the petitioner now presses upon this Court.

The petition relies on two claims which have no basis in the First Circuit's opinion: (1) that the First Circuit failed to defer to the district court's determination that the petitioner's objection to the lack of an instruction on strict liability "duty to warn" was properly preserved when, in fact, the court of appeals reviewed the objection and expressly stated, as did the district court, that the failure to so instruct was error, but that it was harmless error, and (2) that the petitioner was somehow prejudiced by the First Circuit's application of the plain error exception to Fed. R. Civ. P. 51, when in fact, the plain error analysis by the court of appeals afforded the petitioner more review of its unpreserved claims of instructional error than it would have received in a circuit that does not apply the plain error exception.

The jury's verdict and the decisions of the district court and the court of appeals establish the following facts.

1. *The district court did instruct the jury in substance on the "duty to warn" in strict liability.*

The district court instructed the jury on the petitioner's strict liability claim using an instruction which was nearly identical to the one requested by the petitioner.[2] *See City of*

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[1] While the petitioner's motion for new trial asserted errors in the evidence and charge to the jury, the petition for a writ of certiorari relies only upon the trial court's supposedly erroneous instructions and the appeals court's review of those instructions.

[2] *Compare* Jury Instructions at 19 (Appendix to Appellant's Brief to the First Circuit Court of Appeals ("Appendix to Brief") at 1767) *with* Plaintiff's Proposed Jury Instructions No. 33 (Appendix to Brief at 1883).

St. Louis v. *Prapotnik*, 485 U.S. 112 (1988) (there is no error in failing to give an instruction in the precise words of the petitioner's request if its substance is clearly stated). As the petitioner concedes, in both its proposed jury instructions and its response to the district court's draft charge, it simply never requested that the jury be separately instructed on "duty to warn" in the context of strict products liability.[3] And, as the First Circuit observed, the petitioner neglected to provide the district court with a proposed strict liability "duty to warn" instruction in its objections following the charge, and thus failed to comply with Fed. R. Civ. P. 51. (Appendix ("App.") at A22).

The district court specifically instructed the jury that, in determining whether the respondents were strictly liable under a products liability theory, it should consider all of the respondents' acts or omissions, including their alleged failure to "lessen or eliminate the danger of even a useful and desirable product." (App. at A31). This instruction invited the jury to consider whether the respondents had taken steps, including issuing a warning, to eliminate any dangers the product posed. Thus, the jury was fully instructed on New Hampshire strict products liability law, as requested by the petitioner, when it found from the evidence that the respondents' fireproofing was not a defective product. *(See App.* at A35-36 & n.5).

In ruling on the petitioner's motion for new trial, the district court found that even if it was error not to give a separate strict liability "duty to warn" instruction, the error was harm-

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[3] In its petition, the petitioner argues that it was error for the trial court not to have given the *respondents'* proposed instruction on strict products liability. The respondents respectfully suggest that Rule 51 does not contemplate such an objection. *See Lee* v. *Terminal Transport Co.*, 269 F.2d 97, 99 (7th Cir. 1959) (defendant was not in a position to complain on appeal that certain matter was omitted from instructions where omitted material was not covered in any of the instructions that were tendered by the defendant and refused); *Yoham* v. *Rosecliff Realty Co.*, 267 F.2d 9 (3d Cir. 1959) (under Fed. R. Civ. P. 51, before a party can complain on appeal of the failure of the court to give a specific instruction, party must show it requested that instruction).

less because the jury was adequately instructed on the identical "duty to warn" in connection with the petitioner's negligence claim.[4] Since the court did instruct the jury on a "duty to warn" in the context of the negligence claim and the jury, nevertheless, decided against the petitioner, no different result would have been expected if the court had repeated that "duty to warn" instruction as part of the strict liability charge. Regardless of the legal theory, the jury found that there was simply nothing to warn about.

2. *An explicit strict liability "duty to warn" instruction was unsupported by the evidence.*

The petitioner took great pains to argue at trial that its architect and contractors — the entities which specified, ordered, received and used the Monokote-3 — were *not* its agents for any purpose.[5] Furthermore, the petitioner presented no evidence that it, or anyone on its behalf, ever had an opportunity to observe the fireproofing packaging or

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[4] In so holding, the district court construed *Chellman* v. *Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993) to impose an identical "duty to warn" standard on both negligence and strict liability claims. Accordingly, the district court concluded that, had it also instructed the jury on a strict liability "duty to warn," "[i]n the absence of a proposed instruction from plaintiff," its additional instruction "would have likely closely resembled the negligence 'duty to warn' instruction" which the court had already given. (App. at A35 n. 3).

The First Circuit, however, found that *Chellman* did not answer the question whether an identical "duty to warn" standard applied to both negligence and strict liability claims. The court observed that *Chellman* was inapposite because, unlike the present case, in which the jury considered *and* rejected the petitioner's negligence and strict liability claims, *Chellman* involved only a strict liability claim and the jury had not been instructed on "duty to warn," with the result that the plaintiff in *Chellman* was deprived of the opportunity to have the jury consider his strict liability claim based on "duty to warn." (App. at A5-6).

[5] *See* Memorandum of Law in Support of Plaintiff's Position that Knowledge of the Architect Is Not Imputable to Cheshire in This Case. (Appendix to Brief at 2017).

any "warning" that would have appeared thereon.[6] Therefore, the jury had no evidentiary basis on which to conclude that a "warning" on the product could have made any difference to the petitioner. Moreover, the petitioner's own evidence showed that its architects had specifically selected Monokote-3 at a time when an alternative, asbestos-free product was available from the respondents.[7] Placing a statement on the fireproofing bags, indicating that the product contained asbestos, would have amounted to nothing more than a post-sale confirmation that the petitioner was getting precisely what it had ordered.

3. *The jury expressly found that the fireproofing product at issue was not unreasonably dangerous when marketed in 1971 and therefore did not need to be removed from the petitioner's building.*

The petitioner's own evidence demonstrated that any levels of airborne asbestos in its building were well below those permitted by both federal and state law.[8] This evidence proved that the fireproofing did not pose a danger to either building occupants or maintenance personnel. Even if the petitioner could have established that the respondents had a "duty to warn" of a hazard in the fireproofing, that such a warning would have been seen by the petitioner or anyone on its behalf, and that a strict liability "duty to warn" is different from a negligence "duty to warn" under New Hampshire law, the petitioner still could not have prevailed on its strict liability claim because it failed to establish that there was any hazard to users of its building or that it had sustained any injury.

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[6] Because the record is devoid of this evidence, the respondents can only refer the Court to the record generally to confirm this lack of evidence from the petitioner. *See, e.g.*, Trial Transcript, October 12, 1993 at 196-203, Plaintiff's Exhibits 30, 32 and 89.

[7] Appendix to Brief at 688-90, Defendants' Exhibit 247.

[8] *See* Appendix to Brief 1013-1023; 254-255; 305-306; Trial Transcript October 15, 1993 p.m. at 64-65.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD IN REVIEWING THE ALLEGED ERRORS IN THE JURY CHARGE.

A. *The Court Of Appeals Reviewed The Jury Instructions As A Whole.*

Contrary to the petitioner's assertion, the standard of appellate review of alleged errors in jury instructions is well settled. The function of the court of appeals, in reviewing instructions under Fed. R. Civ. P. 51, is to satisfy itself that the instructions show no tendency to confuse or mislead the jury with respect to the applicable principles of law. *See* 9A Charles A.Wright and Arthur R. Miller, *Federal Practice and Procedure* §2558, at 456-57 and nn. 1 & 3 (2d ed. 1995) (and cases cited therein). In determining whether a charge was erroneous, the appellate court must consider the instructions as a whole. *Id.* This is precisely what the court of appeals did in this case.

B. *De Novo Review Was Proper.*

The petitioner argues, in part, that the district court erred in construing the requirements of New Hampshire law regarding what instructions to give the jury on the strict liability claim. This, however, is an issue of law and the law is well settled that the court of appeals was entitled to review such an error *de novo*. *See Salve Regina College* v. *Russell*, 499 U.S. 225, 231 (1991) ("We conclude that a court of appeals should review *de novo* a district court's determination of state law.")[9] *See also U.S.* v. *Chandler*, 996 F.2d 1073, 1085

[9] The petitioner's reliance on *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990) for the proposition that a court of appeals must defer to the trial court is misplaced. That case held that in a Rule 11 proceeding, the court of appeals should defer to the district court's conclusions because such conclusions are rooted in factual determinations rather than purely legal in-

(11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994) (challenge to jury instruction presents question of law reviewed *de novo); Waits* v. *Frito-Lay, Inc.*, 978 F.2d, 1093, 1100 (9th Cir. 1992) (whether a jury instruction misstates the elements that must be proved at trial is question of law to be reviewed *de novo), cert. denied*, 113 S. Ct. 1047 (1993)); *Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1035, 1044 (9th Cir. 1987) (failure to submit proper jury instruction in civil action is question of law reviewed *de novo), aff'd*, 496 U.S. 543 (1990); 999 v. *C.I.T. Corp.*, 776 F.2d 866, 871 (9th Cir. 1985) (same).

Moreover, the logic of the petitioner's argument, that the court of appeals was required to defer to the district court's determination on whether the petitioner properly preserved its objection, would seem to invite the untenable corollary that an appeals court must likewise defer to a trial court's determination that a petitioner did not properly preserve its objection. This would leave no role for a court of appeals under Rule 51.[10]

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quiries, and the district court, "familiar with the issues and the litigants, is 'better situated to marshal the pertinent facts' and apply the necessary fact-dependent legal standard." *Cooter & Gell*, 496 U.S. at 402. In so holding, the Court looked to Fed. R. Civ. P. 52, which requires deference to the factual findings, but not to the conclusions of law, drawn by a trial court.

In contrast, the appellate court is certainly able to review whether a party properly preserved its objections merely by looking at the record. Rule 51, being somewhat mechanical in its specified procedure for preserving objections to jury instructions, would seem to contemplate a review by the appellate court as to whether proper procedure was followed by the trial court.

Additionally, contrary to the petitioner's characterization, *Hicks* v. *United States*, 150 U.S. 442 (1893) held that an appellate court could review the trial judge's charge *as a whole* for error and could *reverse* the trial judge's rulings on the exception made to those instructions even where those exceptions arguably were inadequate.

[10] It is not apparent how the petitioner benefits from this argument. Deference to the district court's treatment of the asserted instructional errors (*i.e.*, the district court rejected the petitioner's claim of error and denied its motion for a new trial) would necessarily result in the affirmation of the jury's verdict in respondents' favor. For this reason alone, grant of the writ is unwarranted. *See, e.g., Sommerville* v. *U.S.*, 376 U.S. 909 (1964)

In any event, the record in this case demonstrates that the court of appeals considered all of the errors in the charge that were alleged by the petitioner, including the omission of a strict liability "duty to warn" instruction.

C. *The Court Of Appeals In Fact Adopted The District Court's Findings.*

The court of appeals did not disregard the trial court's finding that the petitioner had properly preserved its objection that no separate instruction was given on a "duty to warn" with respect to the strict liability claim. In fact, the court of appeals assumed, as did the district court, that the omission of such an instruction was erroneous, but held, for different reasons than the district court, that it was a harmless error.[11] *See generally, In Re Public Service Co. of New Hampshire*, 879 F.2d 987, 989 (1st Cir. 1989) ("It is well settled that a judgment, which is correct in ultimate effect, will not be disturbed on appeal even though the lower court relied upon a wrong ground or gave an untenable reason for its action. *The issue on appeal is the correctness in ultimate effect of a judgment and not the reason or reasons given for it by the trial court.* If the judgment is sustainable upon any legal basis, it will be upheld on appeal despite the erroneous or untenable reasons given by that court for its entry.") (Emphasis in original). *See also J.E. Riley Inv. Co.* v. *Commissioner of*

(certiorari denied despite conflict between state and federal law where resolution of conflict would not change result reached below because petitioner would be liable under either law).

[11] The First Circuit opinion expressly states: "The court's charge to the jury on strict liability failed to include any reference to warning or instructions for use. *We assume, as did the trial court in considering plaintiff's motion for new trial, that this was error. . . . The trial court concluded, however, that the error was harmless. So do we, though on somewhat different reasoning*, from that of the trial court because, unlike the trial court, we do not undertake to predict exactly how the Supreme Court of New Hampshire will resolve a novel issue of substantive law on which plaintiff-appellant relies." (App. at A5) (Emphasis supplied).

Internal Revenue, 311 U.S. 55, 59 (1940) ("[W]here the decision below is correct, it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action."); *Jafke* v. *Dunham*, 352 U.S. 280, 281 (1957) (a successful party in the district court may sustain its judgment on any ground that finds support in the record); *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (acknowledging "the settled rule that, in reviewing the decision of the lower court, it must be affirmed if the result is correct although the lower court relied on a wrong ground or gave a wrong reason"); *Scivally* v. *Time Ins. Co.*, 724 F.2d 101, 103 (10th Cir. 1983) (trial court decision will be affirmed, even when its basis is erroneous, when record reveals another ground which supports the decision). The court of appeals reasoned here that the jury's rejection of the petitioner's "duty to warn" negligence claim barred the strict liability "duty to warn" claim because the jury must have concluded either that the petitioner had failed to prove that the respondents' warnings and instructions violated the prudent care standard, or that the petitioner failed to prove that any inadequacy in the warning caused the petitioner an injury. (App. at A14-15).

Having assumed, as did the district court, that it was error for the district court not to give a strict liability "duty to warn" instruction, and having concluded, as did the district court, albeit on different reasoning, that the error was harmless, the court of appeals went on to note, as an *additional* ground for affirming the district court, that the petitioner was procedurally barred from claiming error because the petitioner failed to proffer such an instruction at trial, as required by Fed. Civ. P. 51. (App. at A22). This observation by the court of appeals was plainly correct. *See City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256, 276-277 (1981) (in the absence of a properly specific objection under Rule 51 made before the jury retires, a party ordinarily cannot claim on appeal that the trial court erred in giving an instruction).

D. *The First Circuit Properly Applied The Plain Error Exception To Federal Rule Of Civil Procedure 51.*

Although the federal rules of civil procedure clearly contemplate that failure to object to (a) an instruction which has been given or (b) the failure to give a jury instruction which has been requested, precludes appellate review, plain error review under Rule 51 is available to correct obvious instances of injustice or misapplied law. *See City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 256.[12] Resort to plain error analysis, however, is appropriate only when an objection is *not* properly preserved. *See Poulin* v. *Greer*, 18 F.3d 979, 982 (1st Cir. 1994).

As the First Circuit made clear in *Poulin*, which it cited in this case with approval, but which the petitioner conveniently ignores, the plain error rule is an exception to Rule 51's requirements and is to be "applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice." *Poulin*, 18 F.3d at 982. Under the plain error exception, an erroneous instruction (or the failure to give an instruction) warrants a new trial only where the error "seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Id.* (citation omitted).

Contrary to the petitioner's assertion, the apparent conflict in the circuit courts over the availability of plain error review is irrelevant and would not affect the outcome in this case. Indeed, with the exception of the Ninth and Seventh Circuits, all of the federal appeals courts utilize a nearly identical

[12] The petitioner argues that *Newport* created confusion regarding the scope of Rule 51, and the availability of a plain error exception to the application of that Rule, and that consequently, resolution of instructional errors varies from circuit to circuit. The petitioner ignores the fact that because it litigated in a forum which allows plain error review of *unpreserved* objections (the same circuit which *Newport* held properly applied the exception) the petitioner was able to obtain judicial review of its claimed error, even though it did not object at trial. Thus, the petitioner was effectively afforded more, not less, review than it might have received in a circuit which does not apply the plain error exception.

standard for finding plain error. *See* 9A Wright and Miller, *supra*, §2558. *See, e.g., Werbungs Und Commerz Union Austalt* v. *Collectors' Guild Ltd.*, 930 F.2d 1021, 1026 (2d Cir. 1991) ("An appellate court will reverse a jury charge on grounds of plain error only when reversal is 'necessary to correct a fundamental error or to prevent a miscarriage of justice.'"); *Pritchard* v. *Liggett & Myers Tobacco Co.*, 350 F.2d 479, 486 (3d Cir. 1965) ("Where it is apparent on the face of the record that a miscarriage of justice may have resulted from counsel's failure to properly protect the interest of his client by timely objection, an error must be noticed and rectified. . . . Since the errors in the trial of this case were fundamental and highly prejudicial, this exception to the general rule is applicable."), *cert. denied*, 382 U.S. 987 (1966); *Stewart* v. *Hall*, 770 F.2d 1267, 1271 (4th Cir. 1985) (in very limited circumstances, a court may consider issue raised for first time on appeal "if the error is 'plain' and if our refusal to consider such would result in the denial of fundamental justice."); *Rodrigue* v. *Dixilyn Corp.*, 620 F.2d 537, 540 (5th Cir. 1980) (noting that the plain error doctrine "is not a routine by-pass to Rule 51 . . . The criterion for application of this doctrine is 'certainly not whether [this] court approves or does not disapprove the results of the case.' Plain error is found, however, if 'the deficient charge is likely responsible for an incorrect verdict which in itself creates a substantial injustice.'") (citation omitted), *cert. denied*, 449 U.S. 1113 (1981); *O'Brien* v. *Willys Motors, Inc.*, 385 F.2d 163, 166 (6th Cir. 1967) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.") (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)); *Morris* v. *Getscher*, 708 F.2d 1306, 1309 (8th Cir. 1983) ("Under federal law, '[e]rror in the instructions not properly objected to is waived unless the error is plain error in the sense that a miscarriage

of justice would otherwise occur.' [P]lain error will be found in only those exceptional cases where the error has 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'") (citations omitted); *Pate* v. *Seaboard R.R., Inc.*, 819 F.2d 1074, 1083 (11th Cir. 1987) ("In order to merit reversal as plain error, appellants must establish that the challenged instruction was an incorrect statement of the law and that it was probably responsible for an incorrect verdict, leading to a substantial injustice."); *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama*, 140 F.2d 13, 15 (D.C. Cir. 1944) ("The power of an appellate court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case. But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on review."); *American Hoist & Derrick Co.* v. *Sowa & Sons*, 725 F.2d 1350, 1364 (Fed. Cir.) (court will reverse jury verdict on the ground of plain error in a charge that was not objected to where it is necessary "to correct a fundamental error"), *cert. denied*, 469 U.S. 821 (1984).

Moreover, review under Fed. R. Crim. P. 52(b), which codifies the plain error principle and provides the underpinnings for the civil exception, is, by its terms, discretionary. *See U.S.* v. *Olano*, 113 S.Ct. 1770, 1778 (1993) ("Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction but is not required to do so. . . . [T]he discretion conferred by Rule 52(b) should be employed 'in those circumstances in which a miscarriage of justice would otherwise result.'") The rule thus implicitly recognizes that courts of appeal are generally and necessarily allowed a wide measure of discretion in the supervision of litigation in their respective circuits. *See generally Thomas* v. *Arn*, 474 U.S. 140, 146-48 (1985) (under its supervisory powers that permit, at the least, the promulgation of procedural rules governing

the management of litigation, the court of appeals properly refused to consider error at trial to which petitioner had failed to object).

Thus, the petitioner should not be heard to argue that the court of appeals was wrong in applying plain error review to a claim of error based on the omission of an instruction relative to New Hampshire's statutory standard for nonoccupational exposure to asbestos. Because the petitioner did not object at trial, and thus failed to comply with Rule 51, absent resort to the plain error exception, there was no basis for review of this purported error by the court of appeals. (App. at A9).[13] Moreover, in that review, the court of appeals found the New Hampshire statute to bear only upon the calculation of costs that the petitioner might incur in the future. Thus, it construed the statute to be relevant only on the issue of damages, a question which the jury never reached, and consequently held that if a failure to instruct the jury on the statutory provisions was error, it was harmless.[14]

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[13] The court of appeals clearly reviewed the claim of error based on the failure to instruct on the New Hampshire statutory nonoccupational exposure standard. The court of appeals stated: "The [petitioner], although objecting to the court's failure to instruct the jury on the New Hampshire statute, did not object to that part of the court's instructions telling the jury that these statutes were relevant to the issue of damages only and not to the issue of liability. The [petitioner] having failed in its objections and request for instruction to articulate an argument for relevancy to liability, or any legal basis for relevancy, we review the trial court's instructions only for plain error." (App. at A9).

[14] The New Hampshire statute at issue, N.H. Rev. Stat. Ann. §141-E (1990), authorizes the State Department of Health and Human Services to enforce the asbestos exposure standards set forth in the statute and to promulgate regulations pertaining to asbestos abatement activities. The provisions on which the petitioner sought an instruction merely define the jurisdictional threshold of authorization for the director of the division of public health services to take certain regulatory action, and set the permissible exposure levels in both occupational and nonoccupational environments. However, at trial, the petitioner produced no evidence that the jurisdictional threshold had ever been applied to its building or that it had been required to close its building as a result of indoor air asbestos fiber levels. Thus, the argument that under New Hampshire law the petitioner would have had to close down its facility is not based on any evidence introduced

Further, the court of appeals properly concluded that the petitioner's attempt to find error in the district court's failure to instruct separately on the "duty to warn" in the strict liability context could not succeed where the petitioner *did not* articulate in any meaningful way (either at trial or on appeal) what substantive instruction it contended the trial court should have given. (App. at A21). Moreover, after its thorough analysis of the "all factors" test advanced by the petitioner on appeal, the court of appeals was compelled to conclude in substance, that the petitioner *could not* have articulated a logical instruction for the trial court to give which did not abrogate the rules governing the burden of proof, *stare decisis* and the role of the jury. (App. at A10-21). By considering and rejecting the possible instructions which the district court might have given — over and above an "ordinary prudence" instruction — the court of appeals effectively gave the petitioner plain error review of an objection the petitioner had not properly preserved.

Even if the First Circuit had not applied plain error review to the petitioner's claim that the district ocurt should have instructed the jury on a more burdensome "duty to warn" standard in the context of strict liability, there would be no merit to the petitioner's contention that the court of appeals selectively applied the plain error exception only to the omission of an instruction on the New Hampshire statutory nonoccupational exposure standard. When it reviewed and rejected the claim of error based on the trial court's failure to give a strict liability "duty to warn" instruction, the court of appeals

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at trial. Moreover, throughout the trial, the petitioner disavowed any claims of harm to building occupants; its theory was that only the occupational exposure standard — which is the same under state and federal laws — had any relevance to the case. The jury was instructed on the identical federal occupational exposure standard and found that no violation of that standard occurred and, consequently, that no injury was sustained by the petitioner. Thus, an instruction that the New Hampshire statute established liability would clearly have been unsupported by law or the evidence and therefore erroneous.

was not, as it was with the New Hampshire statutory nonoccupational exposure standard, dealing with an unpreserved objection to the trial court's instructions. The court of appeals plainly accepted, rather than "silently overruling" as the petitioner contends, the trial court's determination that the petitioner had "properly preserved by timely objection" its objection to the trial court's failure to give a strict liability "duty to warn" instruction, but rejected the petitioner's argument anyway. There was simply no occasion for the court of appeals to review for plain error an objection which it *had already* concluded was properly preserved. Thus, the petitioner has no basis for arguing that the court of appeals somehow acted inconsistently when it applied the plain error exception to review the petitioner's *unpreserved* claim that the trial court erred in not instructing the jury on the New Hampshire statutory nonoccupational exposure standard and did not apply the plain error exception to review the petitioner's *preserved* claim that the trial court erred in not giving a strict liability "duty to warn" instruction.

CONCLUSION

Because the First Circuit afforded the petitioner all of the review it was entitled to, the petition neither raises any material conflict among the circuits nor makes a meritorious claim of any other misapplication of any federal rule. The issues presented by the petitioner therefore do not warrant review by this Court and the petition should be denied.

Respectfully submitted,

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